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WISCONSIN WORKER'S COMPENSATION UPDATE

IN THIS ISSUE

WISCONSIN WORKER'S COMPENSATION PRACTICE GROUP

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CASE LAW UPDATE

The Wisconsin Supreme Court has agreed to accept the appeal of *Operton v. Labor and Industry Review Commission*, 880 N.W.2d 169 (Wis. 2016). This case involves the Labor and Industry Review Commission's interpretation of Wis. Stat. §108.04(5g)(a), and whether an employee's actions constitute "substantial" fault as defined in the statute. An employee's entitlement to worker's compensation benefits for injuries sustained on or after March 2, 2016 are impacted by termination for substantial fault as defined by the unemployment statutes. Therefore, this Supreme Court case will provide some guidance to worker's compensation situations in the future. Oral argument is scheduled for November 10, 2016.

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Decisions of the Wisconsin Court of Appeals

Employment Relationship

Noyce v. Aggressive Metals, Inc., 371 Wis.2d 548 (Wis. Ct. App. 2016). The employer, Aggressive Metals, Inc., was started in February of 2010. The employer was owned by Neal and Nick Holland. They were its sole employees until the employer hired the applicant. He was hired for one week to help on an insulation job. The job was started in the last week of December 2010. The applicant was injured when he fell through a ceiling on January 4, 2011. After it performed its investigation, the Uninsured Employer's Fund concluded that Aggressive Metals, Inc. was, in fact, an employer subject to the Worker's Compensation Act. The employer filed a reverse application to seek an order determining that it was not an employer within the terms of the Act. An unknown administrative law judge held that the employer was an "employer" under the Act. The Labor and Industry Review Commission reversed. The circuit court and Court of Appeals affirmed the Commission's decision. The employer was not an "employer" which was subject to the Act. Wis. Stat. §102.04(1)(b)1 provides that the following are employers: (1) Every person who usually employs three or more employees for services performed in [Wisconsin] or (2) Every person who usually employs less than three employees provided the person has paid wages of $500 or more in any calendar corridor…such employer shall become subject on the 10th day of the month of the next succeeding quarter." The employer in this case did not "usually" employ more than three employees. Further, the alleged injury in this matter occurred prior to the 10th day of the month of January, which would have been the 10th day of the month of the quarter after the employer paid more than $500 in one quarter. Therefore, on the date of the injury, the employer was not an employer subject to the Act and owed no benefits. Prior case law in Wisconsin held that as soon as an employer hired more than two employees, it immediately became subject to the Act. The statutory language at the time of the prior case law was substantially different. The statute in existence at the time of the injury in this matter made it clear the employer was not an "employer" subject to the Act.

Loss of Earning Capacity

Zaldivar v. Department of Workforce Development Labor and Industry Review Commission, 370 Wis.2d 787 (Wis. Ct. App. 2016) (unpublished). The applicant moved to the United States in 1998. He did not have permission to work in the United States. However, the applicant did work until the date of injury involved in this matter. The vocational experts basically agreed that if the historical earnings earned by the applicant in the United States were used, his loss of earning capacity would be in the range of 50%. The employer's vocational expert, however, opined that technically, because the applicant could not legally work in the United States, his legal earning capacity within the United States should be considered zero. The Labor and Industry Review Commission held that the applicant had a loss of earning capacity of 20%. That decision was affirmed by Dane County Circuit Court. The Court of Appeals reversed and remanded. There are eleven elements outlined in the Administrative Code which can be taken into consideration when evaluating an applicant's loss of earning capacity. The first ten items do not address the issue of whether or not an applicant can legally work in the United States. The eleventh item listed is "other pertinent evidence." The "other pertinent evidence" consideration was not fully evaluated. There was no evidence in the record to support the Commission's determination that the applicant sustained 20% loss of earning capacity. The Commission must have been relying on public policy reasons for determining the applicant's earning capacity to be less than the amount of money the applicant had been making while working in the United States. The Commission must reconsider the amount of the applicant's award. If, in fact, it is determined that the applicant could not legally work in the United States, then his loss of earning capacity would be even greater than 50%

because the wage he could expect to make in Mexico would be a few pesos a day. The court did not determine whether "earning capacity" included the amount an applicant could earn illegally. The Commission was ordered to decide the issue of whether or not an individual's earning capacity could include the amount of money an applicant could earn legally and/or without legal permission to work, and in what capacity.

Medical Issue

Flug v. Labor and Industry Review Commission, 370 Wis.2d 789 (Wis. Ct. App. 2016) (unpublished). In February 2013, the applicant repeatedly raised her right arm to use a rather heavy scanner to scan boxes. She started developing soreness and weakness in the arm. Radiological studies showed a significantly degenerated cervical spine. Conservative treatment was undertaken for some period. A neurosurgeon recommended a discectomy and fusion at C5-7. On June 4, 2013 the applicant underwent the fusion procedure. Dr. Soriano performed an independent medical examination on June 18, 2013. Dr. Soriano held that the work-related injury was simply a sprain/strain which had resolved prior to the surgery. The Labor and Industry Review Commission adopted the position taken by Dr. Soriano. The Circuit Court affirmed the Commission's decision. The Court of Appeals affirmed in part and reversed in part. The need for the surgery was not related to any work injury or exposure. Wis. Stat. §102.42(1m) states that "[i]f an applicant who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability indemnity for all disability incurred as a result of that treatment." Historically, that statute has been used in disputes over whether or not a particular medical treatment will help an applicant's condition which is admittedly the result of a work injury. Under the statute, there are only five elements that need to be considered. These include: (1) the applicant sustained a compensable injury; (2) the applicant undertook invasive treatment; (3) the treatment was undertaken in good faith; (4) the treatment is generally medically acceptable, but unnecessary; and (5) the applicant incurred a disability as a result of the treatment. The applicant did not need to prove that the involved surgery was undertaken as the result of a work-related condition if the applicant had sustained a compensable injury. The Commission was ordered to determine whether or not the surgery was undertaken in good faith. If so, the Department was to award appropriate disability benefits pursuant to the terms of §102.42(1m). [Editor's note: The involved statutory provision does not apply to medical bills. Therefore, the Commission's holding that medical benefits were not due was affirmed.] (A petition for review has been filed with the Supreme Court.)✦

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Decisions of the Wisconsin Labor and Industry Review Commission

Arising Out Of

Johnson (Deceased) v. Precise Plumbing, Claim No. 2014-000622 (LIRC June 28, 2016). The applicant died as a result of an aneurysm. At the time of his death, he was in the course of his employment. The applicant worked as a plumber and was assigned to a residential plumbing problem on the date of injury/death. The applicant accompanied the customer to the lower level of the residence and turned on water in a sink. He advised the customer to watch the water in a drain while he performed an inspection elsewhere in the residence. Approximately 15 minutes later the customer's son found the applicant lying on the garage floor in severe physical distress. The applicant was transferred by ambulance to the hospital. He passed away approximately one week later after being treated by a neuro-interventional surgeon. The cause of death was intercranial pressure from a subarachnoid hemorrhage of an arterial aneurysm. The surgeon held the applicant's work caused his death, both directly and indirectly by precipitation, aggravation, and acceleration of a pre-existing condition. The surgeon opined the aneurysm was a dissection, and the dissection occurred prior to the injury and hemorrhaged as a result of work performed on the date of injury at the customer's work site. The surgeon assumed the applicant engaged in physical exertion by moving a 100 pound septic tank cover. This was based upon standard procedure for the service call performed on this date. The cover was, however, in place when inspected post-injury. There was no evidence, such as footprints or disturbance, to indicate the applicant had been near the cover. The applicant collapsed in the garage, which was a significant distance away from the cover. The testimony was that a person who experiences a hemorrhage such as the applicant had, experiences immediate and devastating symptoms and collapse is immediate. Dr. Lyons performed a record review and opined there was no causal connection between the work and the death. He opined the aneurysm was idiopathic, developed over time and the dissection and hemorrhage occurred spontaneously. Administrative Law Judge Sass held the applicant's death did not arise out of his employment. The Labor and Industry Review Commission adopted the findings in their entirety. There is no evidence the applicant's workplace exertion caused the aneurysm. There is no evidence that the applicant engaged in physical exertion from moving a cement septic tank cap shortly before his death. There is also no evidence the applicant was engaged in other employment exertion sufficient to cause the hemorrhage. An injury is non-compensable if the injury was caused by purely personal forces so that employment contributes nothing to the injury. There is no such law in Wisconsin as the "unexplained death presumption." Such a proposition would run counter to the analytically similar situation post by an unexplained fall (which is not compensable in Wisconsin).

Parker v. County of Waushara, Claim Nos. 2009-009499, 2014-010889 (LIRC July 20, 2016). The applicant was employed as a highway worker. He sustained an admitted ACL tear of his right knee in a work-related accident on February 5, 2008. Liberty Mutual Insurance was on the risk on that date. The applicant underwent an ACL reconstruction. The applicant continued working for the employer. He testified that he had sporadic problems with his knee. In March 2013, while walking in snow, he turned and twisted his knee. There was no sudden unexpected traumatic event. West Bend was on the risk on that date. Shortly thereafter, an MRI revealed a new ACL tear. The experts disagreed over the cause of the re-tear. Dr. Pals conducted a record review at the request of West Bend. Dr. Pals held that the applicant's re-tear was the result of attritional failure of the ACL reconstruction which had previously been performed. The records reflected the applicant's knee had felt and acted unstable, despite his ongoing employment and lack of medical treatment. Dr. Pals determined this re-tear was, therefore, causally related to the initial injury while Liberty Mutual Insurance was on the risk. Administrative Law Judge Landowski held Liberty continued to be responsible for the effects of the applicant's knee condition. The Labor and Industry Review Commission affirmed. Dr. Pals provided multiple reasons for opining that the applicant's re-tear was the result of failure of the prior reconstruction.

Average Weekly Wage

Carter F/K/A William D. Allen v. AIDS Resource Center of Wisconsin, Claim No. 2011-28760 (LIRC August 26, 2016). The applicant alleged an average weekly wage of $380.00 based upon expansion to full-time earnings. The employer denied that the wage should be expanded. The employer asserted the wage should be limited to the applicant's actual earnings, which would result in a wage of $228.00 per week, because the applicant self-restricted his employment due to his receipt of SSDI benefits. The employer did not submit a self-restrict statement from the applicant. Administrative Law Judge Phillips held the applicant's wages should be expanded. The Labor and Industry Review Commission affirmed. The general rule is that an average weekly wage is calculated by taking the applicant's hourly rate times the normal full-time rate established by the employer. *See* Wis. Stat. §102.11(1). However, under Wis. Stat. §102.11(f)(2), temporary disability benefits for a part-time worker who restricts his or her availability in the labor market to part-time work and is not employed elsewhere may not exceed the average weekly wages of the part-time employment. Wis. Admin. Code DWD 80.02(2)(d) requires an employer to submit (when applicable) a signed statement from the applicant verifying that the applicant restricts his or her availability on the labor market to part-time employment and is not actively employed elsewhere. This statement is to accompany the WKC-13A. The employer and insurer cannot rebut the general rule of expansion of wages without submission of such a statement.

Bad Faith

Hurt v. Dunn County, Claim No. 2013-023993 (LIRC July 29, 2016.) The applicant was a Deputy Sheriff for Dunn County's Sheriff Department. He sustained a conceded heat exhaustion injury while responding to a call. Two ambulances, an air ambulance and ground ambulance, were on the site of the injury. The air ambulance took him to the hospital. Both ambulances submitted bills to worker's compensation for payment. The applicant's health insurer paid the air ambulance bill. The applicant did not lose time from work as a result of his injury. The worker's compensation claims manager testified at the hearing that they do not investigate claims in which there is no lost time from work, and instead they just routinely pay the medical bills and close out their file. The worker's compensation insurer received the air ambulance bill after it had received the ground ambulance bill. The worker's compensation insurer questioned which bill it needed to pay. As a result, the worker's compensation insurer requested a medical record review. This occurred approximately one month after the insurer received the medical records. The purpose was to determine which medical expense was reasonable and necessary. Dr. Wojciehoski performed the medical record review. He opined the air ambulance was not reasonable or necessary to treat the applicant's condition. The air ambulance had not been on scene for the applicant, but had actually been there for another individual who was pulseless and a non-breather. The claims manager testified she was out of the office for a period of time as a result of her son's traumatic brain injury and stroke, and one of her clerks (who was not a regular claims adjuster) acted on this matter. She testified the service which assisted in securing the independent medical record review was in control of the situation for the most part. Administrative Law Judge Ezalarab held that the air ambulance bill was reasonable and necessary. He reserved the issue of bad faith. Administrative Law Judge Schaeve subsequently held a hearing on the bad faith issue. He held the insurer did not act in bad faith in handling how to pay the air ambulance bill. He determined the insurer's actions were reasonable, timely and in good faith. The Labor and Industry Review Commission affirmed. Judge Ezalarab only reserved a hearing on bad faith with regards to the air ambulance bill because the insurer had already paid the ground ambulance bill prior to that hearing. Judge Schaeve had discretion to limit the issues for hearing, and he reached a reasonable conclusion. The insurer's actions constituted ordinary care. The claims manager testified credibly about her investigation, did not act in a reckless state of mind, and her testimony did not indicate she knew she had no reasonable basis to question the medical necessity of the air ambulance bill.

Consequential Injury

Zoila v. Staffing Partners, Inc., Claim No. 2012-023937 (LIRC September 15, 2016). The applicant sustained an admitted injury to her left wrist at work while lifting a heavy object. She subsequently underwent physical therapy. The applicant alleged she sustained a consequential injury during physical therapy. The respondents denied that the applicant was injured in physical therapy. The applicant's treating physician, Dr. Kehoe, opined that the applicant's left elbow condition was related to her work injury. He opined that, after her work injury, the applicant had symptoms of

cubital tunnel syndrome, which, he opined, then worsened after she attended physical therapy. Dr. White performed an independent medical examination. He opined the applicant's left elbow condition was either idiopathic or related to cubitus valgus from applicant's hyper flexibility. He opined her condition was unrelated to any work incident. Administrative Law Judge Martin held that the applicant's left elbow condition was work-related and awarded benefits. He opined that Dr. White tried to "confuse matters" by asking why Dr. Kehoe did not tell the applicant to stop physical therapy after she began experiencing pain in her left elbow. Judge Martin also opined that, because Dr. Kehoe did not try to dodge or place blame on the applicant's left elbow condition, Dr. Kehoe's opinion was more credible. The Labor and Industry Review Commission affirmed Judge Martin's decision with modifications. Dr. Kehoe's opinions were medically reasonable. An applicant is entitled to compensation if any additional injury or disability is a consequence of treatment for the work injury.

Death Benefits

Hass (Deceased) v. Jenny O Turkey Store, Inc., Claim No. 2013-028975 (LIRC September 15, 2016). The applicant died from injuries sustained in a car accident on November 19, 2013. The insurer paid death benefits to the applicant's widow. The applicant had two children from a prior relationship. The applicant's widow subsequently remarried. Administrative Law Judge Smiley held the applicant's widow failed to show she would suffer any undue hardship upon redistribution of the death benefits. Therefore, Judge Smiley determined the applicant's widow was not entitled to receive additional death benefits as of the date of her remarriage. The Labor and Industry affirmed. The Administrative Code provides that the Department shall reassign death benefits from a surviving spouse to children when a spouse remarries, unless the spouse would suffer undue hardship. The applicant's widow worked full time, received proceeds from a modest life insurance policy and owned her home with a small balance left on the mortgage. She also had some savings and had remarried. The applicant's widow failed to show she would experience undue hardship if the death benefits were reassigned to the applicant's children after the widow re-married. The Department has broad discretion to reassign benefits between surviving spouses and dependent children based on the respective needs of the dependents.

Employment Relationship

Wachter v. Darren Rosenbaum, Claim No. 2014-005455 (LIRC June 30, 2016). The employer performed roofing and other jobs. He obtained the job on the date of injury. The employer was in charge, and specifically instructed others what to do on the job site. The applicant alleged he was hired to work on the employer's construction jobs, particularly a pole barn, and to drive the employer. The applicant worked for three days on the pole barn project until the injury occurred. There were several other workers on the date of injury job site. The employer denied the other individuals were his employees. He denied there was an agreement to pay wages. The applicant was paid $300.00 cash after the injury occurred. The employer testified this was for payment for the employee's work on the date of injury project. However, the employer indicated the other people were at the site with the expectation that the employer would perform services for these individuals in the future on their jobs (i.e. a barter type of system). Those individuals testified that an informal accounting system existed and that they 'owed' the employer hours based upon the work that the employer had done on their sites. They indicated they were not free loaders. There was an expectation some services would be received. The individuals were not volunteers. The employer denied paying $500.00 in wages in one quarter. He admitted paying a couple thousand in 2012 for services for work done. He admitted that he deducted wages paid to other people on his 2012 and 2013 tax returns and that he had records to substantiate the deductions. The applicant testified that, in the summer of 2013, three or four months pre-injury, he had performed roofing work for the employer. He testified that he worked four to five days, eight hours per day, and earned $20.00 per hour (which would total at least $640.00). Administrative Law Judge Smiley held the applicant was an 'employee' of the employer for purposes of worker's compensation. She held that the employer was a subject employer under the Worker's Compensation Act. The Labor and Industry Review Commission affirmed. Under Wis. Stat. §102.07(4)(a), an employee is a person in the service of another under a contract of hire, express or implied, provided the employment is in the course of a trade, business, profession or occupation of the employer. Under *Kress Packaging Co. v. Kottwitz*, 61 Wis.2d 175 (1973) there is a two part test for determining the existence of an employment relationship in worker's compensation cases. The primary test is whether the employer has the right to control the details of the work. The secondary test requires consideration of various conditions including remuneration, direct evidence of

the employer's right to control, the employer's furnishing of tools and equipment and the employer's right to fire and hire. Here, there is no dispute the employer obtained the job on which the applicant was injured. The applicant's testimony regarding a promise for pay per hour in exchange for services, and that the employer directed the work, was credible. Therefore, an employer-applicant relationship existed. Further, the employer was a subject employer for purposes of worker's compensation benefits. Wis. Stat. §102.04 provides the following are "employers" subject to the provisions of Chapter 102: (1) every person who usually employs three or more employees for services performed in [Wisconsin], whether in one or more trades, business, professions or occupations and whether in one or more locations; and (2) every person who usually employs less than three employees, provided the person has paid wages of $500.00 or more in any calendar quarter for services performed in [Wisconsin]. Such employer shall become subject on the 10th day of the month next succeeding such quarter. While it is possible the applicant's prior employment for the employer straddled the second and third quarters, the testimony supports that the employment was all in the third quarter. Therefore, the employer would have been a subject employer under the Worker's Compensation Act at least by October 10, 2013, which was prior to the injury, regardless of how much the employer paid other workers and regardless of whether the employer usually employed three or more employees.

Dorn v. Reinke Equipment, Claim No. 214-014938 (LIRC August 18, 2016). John Reinke owned and operated two businesses, Reinke Family Farm and Reinke Equipment. His wife was the bookkeeper for the two businesses. Prior to 2014, the applicant worked for a hotel and rented a residence on the Family Farm property. He was responsible for rent, electricity and heat. There was no lease agreement. The applicant left his job and was behind on child support, rent and utilities. He went to jail for 6 months because of the child support obligation default. After jail, he contacted John Reinke and his wife. He was offered and accepted the opportunity to perform chores for $8.00 per hour on one of the four Family Farm operations in exchange for rent and utilities, his back rent/utilities and his monthly child support obligation of $400.00 per month. If he earned more than those obligations he would be paid in cash for the difference. He was to check in and out with the wife each day that he worked. The applicant worked jobs for other businesses during this time as well. John Reinke's son Paul was a salaried employee for the Family Farm. John's son Mike was an hourly employee for the Family Farm. The wife's grandson was a salaried farm hand for the Family Farm. John's son Tom was the Vice President and hourly employee for Reinke Equipment. His checks were written by the Family Farm account. On occasion Tom would assemble a crew to travel to job sites to deliver, assemble and install farm equipment. The applicant served on such a crew three to four times over the course of six years. The crew included John's three sons, grandson and two or three other individuals at times. On the date of injury, the crew included two sons, the grandson, and applicant. The applicant's injury was sustained while installing equipment at a farm. One son and grandson indicated the applicant was at the job site only because he asked to ride along in order to purchase personal items at a store on the way home and the applicant was only volunteering his services at the time of the injury. The applicant alleged he had been directed by John Reinke to be part of the crew on that date. Administrative Law Judge Falkner held the applicant was an employee of Reinke Equipment at the time of his injury, and that the injury arose out of and in the course of said employment. The Labor and Industry Review Commission affirmed. The grandson's testimony regarding the circumstances of being at the job site on the date of injury, the time spent at the job site, and the mechanism of alleged injury was inconsistent and therefore not credible. The wife's records did not show the applicant had checked out with her prior to the alleged injury, which he would have done if he was just riding along to the store to purchase items. The *Kress* factors and tests to determine employment relationship were primarily satisfied. The distinction between payment from the Family Farm vs Reinke Equipment and employment relationship between the same were disjointed because of the Reinke's carelessness in maintaining financial records. This should not inure to their benefit. The applicant expected to be paid for the services performed whether he was paid by Reinke Equipment or the Family Farm. Further, the fact that the applicant was routinely on the books only for the Family Farm does not suffice to demonstrate the lack of relationship to Reinke Equipment because the Vice President of Reinke Equipment was also paid from the account of the Family Farm. Additionally, the evidence demonstrates the applicant could be considered a loaned employee and Reinke Equipment the special employer for the work on the date of injury. The applicant impliedly consented to working for Reinke Equipment when he was assigned to the crew and followed through with the assignment. He was

performing services that Reinke Equipment had the right to control and assigned, and the work performed was for the benefit of Reinke Equipment. Reinke Equipment is not a farm for purposes of exceptions for jurisdiction for worker's compensation coverage. There was not sufficient evidence that Reinke Equipment usually employed three or more employees under Wis. Stat. §102.04(1)(b)(2). However, Tom was paid more than $400.00 per week. He was paid, therefore, more than $5,200.00 per quarter in 2013. While the payments were made from the Family Farm account, it was clear they were paid for services performed for Reinke Equipment. Therefore, Reinke Equipment became subject to the Act no later than the end of 2013, which was prior to the alleged injury in March 2014.

End of Healing

Farley v. Mo Jo of Milwaukee, Claim No. 2013-002519 (LIRC July 29, 2016). The applicant was employed as a general manager. He fell down six stairs while going into the basement on October 17, 2012 to change the beer lines. He was diagnosed with post-concussive symptoms. Two of the applicant's treating physician's prepared WCK-16s. They opined the applicant's condition was related to his October 17, 2012 work incident. Dr. Novom performed an independent medical examination on July 30, 2013. Dr. Novom diagnosed the applicant with post-concussive symptoms and post-traumatic headache. He opined the applicant should obtain occipital nerve blocks. Dr. Novom opined the applicant had not reached end of healing. Dr. Novom prepared several supplemental reports. On April 24, 2014, Dr. Novom opined the applicant had reached end of healing as of November 21, 2013 (which was the date of his most recent examination of the applicant) sustained no permanency, and did not require additional treatment. Administrative Law Judge McKenzie adopted Dr. Novom's opinions. She held the applicant sustained a work injury on October 17, 2012 and had reached end of healing by November 21, 2013. The Labor and Industry Review Commission modified this decision. The applicant reached the end of healing as of April 24, 2014 instead of November 21, 2013. Additional temporary total disability benefits were owed to the applicant. This determination was based upon the date of Dr. Novom's report. The date of the report controls. Retroactive assessment of end of healing is not permitted for purposes of termination of payment of wage loss benefits. Instead, the date of end of healing is the date of the report.

Jurisdiction

Ninke v. John Mayer, Claim No. 2013-031827 (LIRC August 26, 2016). The applicant was 17 years old at the time of the alleged injury. He was a high school student. He worked for the alleged employer for three months as a farm laborer. The alleged employer was a sheep farm. The applicant, other adults, and 15 other high school students, performed duties for the alleged employer. These individuals had to keep a record of days and hours worked. They submitted these timesheets to the employer to get paid. The employer kept a list of those scheduled to milk sheep and other milk data. There was no schedule for submitting the time sheets or for getting paid. The alleged employer was aware that he had to employ six or more employees on at least 20 days during a calendar year to be a covered employer for worker's compensation purposes. He alleged that, as of the date of injury, he had only employed six or more workers on 19 days. [Responsibility for coverage begins ten days after the 20 days was met. Therefore, the date important is ten days before the injury. Three of the dates submitted by the employer were in that interim ten day period.] The alleged employer did not have worker's compensation insurance at the time of the injury. The alleged injury occurred in mid-June 2011. In early 2012 the alleged employer was contacted by the applicant's attorney and told that the applicant would be making a claim against the uninsured fund instead of the alleged employer. The alleged employer concluded that he would have no role in the claim. In 2013 the alleged employer disposed of worker timesheets and the calendar schedule. [This was alleged to be spoliation but the courts did not specifically address that allegation in the context of the worker's compensation system.] The alleged employer also testified that he did not keep a list for any time after the alleged date of injury in this matter. However, he did testify that he kept a list in other years and that the information was important to his business. Judge Doody determined there was legitimate doubt regarding whether the alleged employer was a covered employer for purposes of worker's compensation jurisdiction on the date of injury. The applicant could not put forth specific dates and all allegations were speculative. The Labor and Industry Review Commission reversed and remanded the case to the Office of Worker's Compensation Hearings for further proceedings, including a hearing on the merits of the applicant's claim. The applicant has the burden to prove all elements of a claim including proof that an alleged employer was subject to the worker's compensation act. Specifically the applicant had

the burden of demonstrating the alleged employer did employ six or more people on 20 days at least 10 days prior to the alleged injury. The employer then has the burden of rebutting that evidence in order for jurisdiction not to attach. The applicant credibly testified that he worked 40 days for the alleged employer and that, on 30 of those, he worked with at least five other people. The alleged employer did not successfully rebut that testimony. The alleged employer conveniently recreated a list with one less than the "magic" number for jurisdiction to attach, based upon his memory and unverified assumptions in light of his having discarded documentation that pre-dated the alleged injury for the year of the injury. Rebutting the applicant's testimony involves something more than conjecture. The alleged employer testified that he knew that the magic number was 20 days and his counting of 19 days leads to the impression he came up with that figure to avoid jurisdiction and liability.

Occupational Injury

Griffiths, Bruce v. C Bretting MFG. Co. Inc., Claim No. 2014-003751 (LIRC July 29, 2016). *Griffiths, David v. C Bretting MFG. Co. Inc.*, Claim No. 2011-0011678 (LIRC July 29, 2016). The applicants were brothers who both worked for employer. Their cases were consolidated for hearing and appeal. It was undisputed that they both had lung disease and were permanently and totally disabled. Their other family members did not have lung disease. Neither applicant smoked. NIOSH investigated possible exposure at the employer facility. NIOSH determined that four employees, including the applicants, had lung disease. NIOSH also determined that the microbial contaminants it found in the employer's metal working fluids were associated with respiratory illnesses, such as asthma, hypersensitivity pneumonitis, and worsening pre-existing respiratory problems. NIOSH was unable to state the exact components or contaminants responsible for the lung problems. NIOSH also found different concentrations of bacterial and fungal growth at the plant, including Endotoxin, which could cause inflammation and adverse respiratory effects that were below the occupational exposure level. NIOSH concluded that the exposure at the employer's plant and the rare lung disease were causative, and not coincidental, but noted they did not have certainty. NIOSH also opined there was a significant possibility that the lung disease was a response to inhaling the metal working fluids. The respondents provided reports from a doctor, an industrial hygienist, and the manufacturer of its metal working fluids, to rebut NIOSH's findings. These experts opined that NIOSH failed to provide objective support for its findings, and criticized how NIOSH collected data to support its conclusions. They also opined NIOSH did not consider all non-occupational factors that could cause lung disease. Dr. Keifer examined the applicant and his brother's medical records, and other reports at the request of the respondents. Dr. Keifer opined that while NIOSH opined the connection between exposure and the lung condition was plausible, it did not reach a level of over fifty percent likelihood of causality. The applicants' treating physician, Dr. Wendland, opined their conditions were caused by a hypersensitivity reaction to an inhaled particle or mist that was unknown at that time, and that statistically it was impossible that the four employees could have lung disease in employer's employee population by chance alone. He, therefore, opined the applicant and his brother had sustained an occupational lung disease from exposure while working for the employer. Administrative Law Judge Endter held that the overwhelming inference drawn from all of the evidence was that the applicants' lung disease was not causally related to their employment with employer, because NIOSH merely determined causation was a possibility, that the samples collected by NIOSH were below exposure limits, NIOSH was unaware of lung disease in other metalworking environments, NISOH did not give the employer citations, metalworking fluids were combined with a non-toxic preservative to make them safe to use, and NISOH admitted that it might never know the cause of the applicants' lung disease. Judge Endter also opined that Dr. Wendland did not specify the causative agent. The Labor and Industry Review Commission affirmed Judge Endter's decision. The medical evidence did not support a holding that the applicants' workplace exposure was a material contributing causative factor to their diagnosed lung disease. The Commission also distinguished these companion cases from *Casta v. Kmark Corp.*, WC Claim No. 2006-034342 (LIRC, March 31, 2007), because the present cases did not have the same level of certainty regarding causation of the applicants' conditions as was present in *Casta.*

Permanent Total Disability

Peterson v. Fresh Brands Distributing, Inc., Claim No. 2008-014952 (LIRC July 20, 2016). The applicant sustained a conceded lumbar spine injury. The applicant was 57 years old. She did not graduate high school and/or obtain a GED. The majority of her work experience was in the unskilled work category. She was not qualified for placement in the semi-skilled or skilled employment. She

was assigned very severe medical restrictions by her treating physician. Both vocational experts opined the applicant was *odd lot* permanently and totally disabled when considering the treating physician's medical restrictions. Dr. Karr performed an independent medical examination at the respondent's request. Dr. Karr opined the applicant's permanent restrictions were less restrictive in nature than those assessed by the treating physician. The applicant did not apply for services from the Division of Vocational Rehabilitation. Administrative Law Judge Mitchell held the applicant was entitled to permanent total disability benefits. The Labor and Industry Review Commission affirmed. An administrative law judge has discretion on the issue of whether to withhold a decision on loss of earning capacity until the applicant seeks the services of DVR pursuant to *Gilson v. Kimberly Clark Integrated Services*, Claim No. 92-008336 (LIRC December 23, 1994). The administrative law judge in this case did not err by not requiring the applicant to seek vocational rehabilitation benefits before determining the loss of earning capacity given the applicant's age, education, restrictions, and vocational expertise.

Psychological Injury

Griffith v. Milwaukee School Board of Directors, Claim No. 2013-001074 (LIRC July 29, 2016). The applicant worked for the employer as an elementary school teacher's assistant and then as a teacher. During her employment, she was physically assaulted by students on several different occasions. She returned to work after each incident. She began working with a middle school classroom of 6th to 8th grade students who were on "most restrictive placement," because of the students' special needs as a result of various degrees of disability levels. On January 4, 2013, three of her students were prohibited from attending gym class because of their behavior one day earlier. One of the boys called her a "b****," told her he had hit his last teacher, and started pounding her chest, throwing books at her and hitting her arms. The applicant called for help. No one came to assist her. Eventually she was able to leave the classroom and go to the principal's office. She completed an accident report. She then returned to the classroom because there was no one at the school to replace her. The principal had asked her to return to the classroom. When the applicant left work that day, she sought medical treatment. She treated for low back and chest pain initially. She later started treating for a psychological condition, which eventually included treating with a counselor. On the first day of the 2013-2014 school year, the applicant got dressed and broke out in sweats, dizziness, felt weak, and had chest pain. She did not return to work. The applicant's treating physicians diagnosed her with post-traumatic stress disorder, depression, anxiety, mental stress with insomnia, and severe stress disorder with headaches, and back pain in her thoracic region. Dr. Van Valkenburgh opined she was permanently and totally disabled. Her vocational expert opined she sustained a total loss of earning capacity. Dr. Langmade performed an independent medical examination. He opined the January 4, 2013 incident temporarily aggravated the applicant's pre-existing condition. He opined she returned to baseline by August 23, 2013. The respondents' vocational expert opined the applicant had not sustained any loss of earning capacity. Administrative Law Judge Cathy Lake held that the applicant's testimony and the opinions of her treating providers were credible. Permanent total disability benefits were awarded. The Labor and Industry Review Commission reversed. Dr. Van Valkenburgh's opinion was internally inconsistent. He opined the applicant's condition had not stabilized and he could not estimate when her condition would stabilize, but he also opined she was permanently and totally disabled. The Commission held Dr. Langmade's opinion that the applicant's ongoing condition was the result of personal life stressors and she had only sustained a temporary aggravation of her pre-existing anxiety was more credible.

Unreasonable Refusal to Rehire

Schucknecht v. Trees Tree Service, Inc., Claim No. 2015-007871 (LIRC June 18, 2016). The applicant and employer agree the employer offered the applicant a job shortly after the employer was notified the applicant was released to full duty. The parties agree the applicant spoke with the employer the day after the job offer and the applicant indicated he did not intend to return to work. The applicant alleges he would have returned to a hostile work environment. Administrative Law Judge Falkner held that he found the employer completely incredible (for numerous reasons). However, he denied the applicant's claim on the basis that the applicant did not demonstrate that he was terminated. Administrative Law Judge Falkner specifically noted that, if the employer had the burden and the applicant had not agreed that he had declined the offered position, the employer would not have prevailed because he was so incredible. The Labor and Industry Review Commission adopted Administrative Law Judge Falkner's decision in its entirety. The

applicant failed to provide that he was denied rehire or discharged by the employer. Instead the evidence shows he declined a job offer. When an applicant has been terminated prior to being released to return to work, the applicant does not need to report to work or re-apply for employment to be eligible to recover benefits under Wis. Stat. §102.35(3). An employer may not avoid liability by making a pro forma rehire. However, when an applicant has not accepted an offer of work there is insufficient evidence that the job offer was not genuine. When an employer does not admit to having terminated an applicant, the applicant retains the burden of proof of demonstrating a termination occurred. If the applicant cannot meet that burden, his claim must fail.

Brodie v. Manpower, Inc., Claim No. 2014-017744 (LIRC July 29, 2016). The applicant was employed by Manpower, Inc., a temporary agency. The handbook includes a provision requiring each employee to keep the employer informed as to his or her availability in order to maintain employment status with the employer. Specifically the employee must notify the employer by phone within 48 hours of completing an assignment, and then must contact the employer each week until placed with a new assignment. If the employee does not contact the employer, the employer considers the employee unavailable for work and to have voluntarily resigned from employment. The applicant was assigned by the employer to work at Milwaukee Electric Tool. He developed admitted bilateral carpal tunnel syndrome. During his treatment, the employer gave the applicant light duty work directly for the employer. This light duty assignment ended when the applicant was released to work without restrictions. He was told to go home and collect unemployment. The applicant was placed on the employer's available list. The applicant was told to call in his availability for assignments or go online and apply directly for positions. The applicant did this the following week. He testified that he applied for jobs daily for 30 days. He took some tests and scored well. He stopped going to the employer's facility when he obtained employment elsewhere, not through the employer. Administrative Law Judge Phillips, Jr. held the applicant was entitled to benefits for unreasonable refusal to rehire. The Commission affirmed. There was no argument that the applicant did not establish a *prima facie* basis for a wrongful refusal to rehire claim. The employer, therefore, had the burden in this case. The temporary employer does not have full control over whether or not a particular company is willing to accept an employee on a part time basis. With a temporary service employer, the failure to offer a position to an employee is not proof of a refusal to re-hire. The employer did not need to demonstrate that it actually placed the applicant into an assignment to alleviate responsibility for the claimed benefits. Instead, a temporary agency needs to demonstrate that it engaged in reasonable placement efforts. There was no evidence that the employer engaged in any placement activity for the applicant any day after the applicant presented himself for full duty. This was despite the applicant's testimony that he went to the employer's facility daily for 30 days. There is a higher burden on an employer where an employee sustains a work-related injury. A temporary agency must demonstrate active attempts at placement to relieve itself from liability. (Editor's note: This requirement can in effect impose significant recordkeeping difficulty on temporary placement agencies that wish to protect themselves against wrongful refusal to rehire claims.)

Pabon v. DS Management, Claim No. 2013-030668 (LIRC September 15, 2016). The applicant was hired by DS Management, an employment agency. He was assigned to work at Vulcan Manufacturing. He sustained an injury to his right pinky finger on October 15, 2013. He was then informed that he was one of two employees being fired that day. The applicant called DS Management and spoke to the manager. She informed the applicant that her record indicated the applicant had not been fired. The applicant was released to work full duty on January 8, 2014. He contacted his employer. He was informed there were no jobs available to him. The applicant testified that he called weekly for two months requesting work. He testified that, at one point, he was told he would get a better paying job. His attorney also wrote him a letter indicating that his employer was willing to re-hire him. However, he testified that he was subsequently not given any job. DS Management eventually terminated the applicant. At the hearing, DS Management's manager testified that Vulcan Manufacturing laid off a number of employees in 2014, and did not hire anyone new in 2015. When asked why she did not give the applicant a job elsewhere, she testified that was not how DS Management operated. Administrative Law Judge McKenzie held that DS Management violated Wis. Stat. §102.35(3) and unreasonably terminated the applicant. The employer failed to provide a reasonable explanation for why they did not find another position for the applicant. The Labor and Industry Review Commission affirmed. It was undisputed that the applicant was an employee of DS Management, who sustained an injury on the job and was not

re-hired. DS Management was informed of the applicant's ability to return to work without restrictions, which was sufficient to establish the requirements for the applicant to have applied to be rehired. The applicant did not need to clarify with his employer which jobs he was able to perform because he had been released to work the same job he had before his injury. The employer failed to show reasonable cause for not offering another job assignment to the applicant after he was released to work without restrictions.

Vocational Rehabilitation

Chartier v. Waupaca Foundry, Inc., Claim No. 2008-001746 (LIRC August 18, 2016). The applicant sustained an admitted right wrist injury on August 17, 2006. He received temporary total disability benefits, and permanent partial disability benefits. He applied for assistance from the Department of Vocational Rehabilitation. He was placed in the Category Two (on the waiting list). However, instead of waiting for services from the Department of Vocational Rehabilitation, he hired a private rehabilitation consultant. Administrative Law Judge Sass awarded the applicant's request for vocational rehabilitation benefits with a private consultant. The parties had stipulated that, if the applicant was eligible for vocational rehabilitation benefits, he was entitled to receive 80 weeks' worth of benefits. The applicant had attended one semester of courses without financial assistance from the respondents. He was attending courses toward receiving his associate degree in manufacturing engineering technology. The applicant withdrew from one of his two classes at Nicolet Technical College because the classes were too difficult. His wife then moved to Rhinelander. The technical college in Rhinelander did not offer an associate degree in manufacturing engineering technology. After consulting with his rehabilitation consultant, the applicant decided to switch to a program to receive a bachelor's degree in business management because it would allow him to move to Rhinelander and continue his retraining. He also reapplied for services through the Department of Vocational Rehabilitation. The applicant was placed on the waiting list. Because his daughter was in the middle of her school year, and their house was still on the market, the applicant decided to postpone his move to Rhinelander. He resumed taking classes at Nicolet Technical College. He failed to pass two of his classes that semester. He completed 10 credits with a GPA of 3.091. The applicant eventually completed 54 credits at Nicolet Technical College. He planned to complete the 12 additional credits to obtain his associate's degree at Nicolet Technical College and then enroll in Silver Lake College to complete his bachelor's degree. He would need to complete 55 additional credits at Silver Lake College. Alternatively, he determined that he could go to Silver Lake College and complete 66 additional credits to receive his bachelor's degree. The respondents argued that because the applicant underused his 80 weeks of vocational benefits, by completing only 32 weeks of retraining, dropping one class, and failing classes, he should not receive additional benefits. Administrative Law Judge Landowski noted that the respondents did not pay for the applicant's initial schooling, and required him to work and go to school at the same time. Judge Landowski noted that when the applicant was able to quit working, and only focus on school, his grades steadily increased. Administrative Judge Landowski held the applicant's school performance through the date of the hearing did not preclude him from additional rehabilitation benefits. Administrative Judge Landowski also held that the applicant could not restore his pre-injury capacity and potential without a bachelor's degree. The Labor and Industry Review Commission affirmed Judge Landowski's decision in part. The Commission affirmed that the applicant was entitled to rehabilitation benefits that would allow him to complete his associate's degree in business management. The Commission held that an associate's degree in business management on its own would restore the applicant to his earning capacity potential. ✦

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